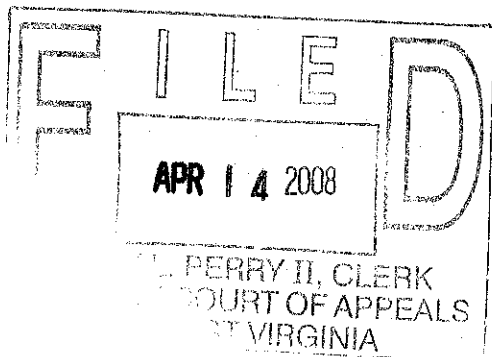

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 33891

IN RE TAX ASSESSMENT
OF THE FOSTER FOUNDATION'S
WOODLANDS RETIREMENT COMMUNITY

CIVIL ACTION NO. 07-C-214
Judge John L. Cummings

BRIEF OF APPELLANT



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

IN RE TAX ASSESSMENT
OF THE FOSTER FOUNDATION'S
WOODLANDS RETIREMENT COMMUNITY

CIVIL ACTION NO. 07-C-214
Judge John L. Cummings

FROM THE CIRCUIT COURT OF CABELL COUNTY

BRIEF OF APPELLANT

The Foster Foundation, a 501(c)(3) non profit corporation, hereby files its Brief pursuant to this Court's Order dated March 13, 2008 granting Appellant's Petition for Appeal. Appellant filed its Petition for Appeal seeking relief from an Order of the Circuit Court of Cabell County (Judge John L. Cummings), entered September 6, 2007, which upheld the ruling of the County Commission of Cabell County, West Virginia sitting as the Board of Equalization and Review ("County Commission") setting the appraised value of the Woodlands Retirement Community ("Woodlands") at \$29,759,000 for tax year 2007.

All taxpayers are entitled to have their property appraised for tax purposes at its true and actual value. Accordingly, the West Virginia Legislature has provided the taxpayers of this State a process by which to appeal an ad valorem tax assessment. Due process of law guarantees that any hearing on such an appeal must be heard by an impartial tribunal and that the hearing must be conducted fairly.

In the instant case, the procedures pursuant to which Foster Foundation was required to contest and appeal the assessment of the Woodlands and the standards of proof and review imposed in connection therewith failed to provide due process of law. The factors giving rise to

the denial of due process include: the County Commission's inherent conflict of interest in serving as both an interested party and an "impartial" decision maker; the high standard of proof imposed on the Foster Foundation to rebut the Assessor's appraisal; the Assessor's and County Commission's failure to consider factors such as Woodlands being a not-for-profit home for the aged; the lack of any requirement for the Assessor to provide evidence supporting its valuation; the lack of evidence before the County Commission to support the Assessor's valuation or to refute Foster Foundation's evidence that the Assessor's valuation was excessive; and the lack of evidence before the Circuit Court to support the County Commission's determination of value or to refute Foster Foundation's evidence of true and actual value.

KIND OF PROCEEDING AND NATURE OF LOWER COURT'S RULING

Pursuant to the provisions of W. Va. Code § 11-3-24, the Foster Foundation appeared before the County Commission on February 9, 2007 and contested the appraised value of the Woodlands for tax year 2007. At the hearing, the Foster Foundation submitted information, including the reports, findings, and expert testimony of licensed real estate appraiser Robert K. Withers. Neither the Assessor nor the County Commission submitted any written evidence concerning the Assessor's valuation. By Order dated February 22, 2007, the County Commission set the assessed value of Woodlands at \$29,759,000 for tax year 2007. In doing so, the County Commission valued Woodlands far in excess of its true and actual value in contravention of the provisions of W. Va. Code § 11-3-1, *et. seq.* and Article X, Section 1, of the Constitution of West Virginia.

Pursuant to the provisions of W. Va. Code § 11-3-25, the Foster Foundation appealed the Order of the County Commission to the Circuit Court of Cabell County. By Order entered

September 6, 2007, the circuit court affirmed the February 22, 2007 findings of the County Commission. The Foster Foundation then filed this appeal.

STATEMENT OF FACTS

1. The Foster Foundation is a 501(c)(3) non-profit corporation engaged in the operation of the Woodlands, which is a home for the aged not conducted for private profit. The Foster Foundation maintains a long established policy with its residents to care for them for life regardless of ability to pay. Accordingly, since 1923, the Foster Foundation has been granted and has maintained tax exempt status under the Internal Revenue Code.

2. The Cabell County Assessor's office lists and values all property in Cabell County, West Virginia, including the Woodlands, in order to assess ad valorem real property taxes according to the fair market value of property. By letter dated January 2, 2007, the Cabell County Assessor's office notified the Foster Foundation that for tax year 2007 the assessed value of the Woodlands would be based upon an appraised value of \$38,137,300.

3. On or about January 31, 2007, the Foster Foundation filed an Application for Review of Property Assessment with the County Commission challenging the Assessor's appraised value of \$38,137,300 for tax year 2007.

4. By letter dated January 24, 2007, the Foster Foundation was informed that its hearing before the County Commission would be on February 9, 2007 and that it must submit "Clear and convincing evidence", which by definition means 'formal appraisals and/or expert testimony by qualified people,' to prove that the assessment is in fact erroneous". See Letter from Cabell County Commission dated January 24, 2007.

5. Prior to the hearing, the Assessor changed the appraised value to \$31,190,000.

6. West Virginia Code section 30-38-1, et seq. provides for licensing of real estate appraisers in West Virginia. Section 30-38-1(a) provides that only a person licensed by the West Virginia real estate appraiser licensing and certification board is authorized to make formal property appraisals or qualify as an expert relating to the valuation of real property within the state of West Virginia.

7. Accordingly, the Foster Foundation retained the services of Robert K. Withers, a licensed appraiser pursuant to West Virginia Code section 30-38-1 *et. seq.* to conduct an appraisal of the Woodlands. Mr. Withers has obtained West Virginia's highest accreditation as a State Certified General Real Estate Appraiser which, pursuant to West Virginia Code Section 30-38-4(d), authorizes him to conduct appraisals of all types of real estate. Mr. Withers conducted a detailed inspection of the Woodlands, comparable properties, and the market area and determined the fair market value of the Woodlands was \$14,900,000. See Robert K. Withers' Appraisal of the Woodlands at p. 17.

8. On February 9, 2007, the hearing on the Foster Foundation's Application for Review was conducted before the County Commission. Mr. Withers testified at the February 9, 2007 hearing that the Assessor's appraised value of the Woodlands is erroneous because of the factors identified in his report. Of primary concern is that a willing purchaser of the Woodlands would discount the value of the property by the assumed liabilities of caring for the approximately 300 current residents of the Woodlands for the remainder of their lives.

9. Furthermore, at the time the Foster Foundation built the Woodlands, as a non-profit, charitable organization Foster Foundation had always been exempt from ad valorem real property taxation for its other retirement facility. In fact, the Woodlands was constructed, in part, using the proceeds of tax exempt bonds issued by the Cabell County Commission. In

connection with the initial tax exempt bond issue, the project was appraised and the appraiser at that time, Mr. R. Terry Watson, stated that "This value estimate is predicated on the subject attaining tax-exempt status from its affiliation with the Foster Foundation of Huntington, West Virginia. . . . **Any change from this tax-exempt status could materially influence value, which would require a revision.**" See Robert K. Withers' Appraisal of the Woodlands at p. 3 (emphasis added). Mr. Withers agreed with Mr. Watson stating, "Thus, as Mr. Watson stated, the property is adversely impacted by a tax burden." Id.

10. Accordingly, Mr. Withers concluded that "the [Woodlands'] marketability is rated as poor, because it produces little or no profit. Additionally, there are clouds hanging over the property as to its status as a tax-exempt property for ad valorem purposes and the highly excessive tax assessment." Id. at p. 17.

11. At the hearing, the Foster Foundation learned that the Woodlands had been assessed by Mr. Brian Daniels, a county employee who was not licensed by the West Virginia real estate appraiser licensing and certification board and that of his 2,500 "assessments" for the year 2007, the Woodlands (a non-profit retirement community) was, surprisingly, his highest taxed entity in the entire City of Huntington.

12. The Assessor did not introduce any written evidence concerning the methodology, information used, or other bases of the Assessor's valuation at the hearing.

13. After all the evidence, testimony, and oral and written arguments were entered into the record, the County Commission informed the Foster Foundation that it would be notified by mail as to the Board's decision.

14. On February 22, 2007, the County Commission entered an Order reducing the appraised value of the Woodlands to \$29,759,000 for tax year 2007 without explanation. This value was far in excess of Mr. Wither's appraised value of \$14,900,000 and slightly less than the Assessor's latest valuation of \$31,190,000. The record reveals that the value adopted by the County Commission is approximately the amount of insurance that Foster Foundation testified that it carried in response to a question from the County Commission.

15. By letter dated February 26, 2007, the County Commission notified the Foster Foundation of its February 22, 2007 Order.

16. Based upon the Order of the County Commission, the Foster Foundation filed its Petition for Appeal in the Circuit Court of Cabell County seeking relief from the excessive assessment of the Woodlands' value.

17. On or about June 26, 2007, a hearing was conducted before the Honorable Judge John L. Cummings in the Circuit Court of Cabell County regarding the assessed value of the Woodlands Retirement Community for tax year 2007.

18. By Order dated September 6, 2007, Judge Cummings ruled that the Foster Foundation failed to prove by clear and convincing evidence that the County Commission erroneously valued its property and denied the Foster Foundation's request to have the assessed value of the Woodlands reduced to its fair market value of \$14,900,000. See Order.

19. On or about January 7, 2008, the Foster Foundation filed its Petition for Appeal challenging the assessed value of the Woodlands. On or about January 18, 2008, the County Commission of Cabell County filed its written response in opposition thereto. By Order dated March 13, 2008, this Court granted the Foster Foundation's Petition for Appeal.

20. The Foster Foundation now files its Brief pursuant to this Court's March 13, 2008 Order and the West Virginia Rules of Appellate Procedure.

ASSIGNMENTS OF ERROR

- I. THE COUNTY COMMISSION AND THE CIRCUIT COURT ERRED IN HOLDING THAT THE FOSTER FOUNDATION FAILED TO MEET ITS BURDEN IN PROVING THE APPRAISED VALUE OF WOODLANDS FOR TAX YEAR 2007 EXCEEDED ITS TRUE AND ACTUAL VALUE.
- II. THE COUNTY COMMISSION AND THE CIRCUIT COURT ERRED IN NOT REDUCING THE APPRAISED VALUE OF WOODLANDS TO ITS TRUE AND ACTUAL VALUE AS REQUIRED BY WEST VIRGINIA LAW.
- III. THE COUNTY COMMISSION AND THE CIRCUIT COURT ERRED IN DENYING THE FOSTER FOUNDATION DUE PROCESS DURING ITS APPEAL OF AN EXCESSIVE AD VALOREM TAX ASSESSMENT.
- IV. THE COUNTY COMMISSION AND THE CIRCUIT COURT ERRED IN FAILING TO ACCOUNT FOR THE UNIQUE CHARACTERISTICS OF WOODLANDS IN DETERMINING ITS TRUE AND ACTUAL VALUE.

STANDARD OF REVIEW

This case presents questions of law and questions of law are reviewed *de novo*. Syl. Pt.

4, Burgess v. Porterfield, 469 S.E.2d 114 (W.Va. 1996).

DISCUSSION OF LAW AND ARGUMENT

- I. THE PROCESS BY WHICH A TAXPAYER MUST APPEAL AN AD VALOREM TAX ASSESSMENT IMPERMISSIBLY VIOLATES DUE PROCESS.

The West Virginia Supreme Court of Appeals has long recognized that “[t]he government and every one of its branches, departments, agencies, and subdivisions are bound by the prohibition of the due process guaranties, which extend to legislative, judicial, administrative, or executive proceedings.” State ex rel. Ellis v Kelly, 145 W. Va. 70, 112 S.E. 2d 641 (1960) (citations omitted). Furthermore, West Virginia Code section 11-3-1 requires that “[a]ll property

shall be assessed annually . . . at its true and actual value". True and actual value means fair market value, which is what the property would sell for if it were sold on the open market. See Kline v. McCloud, 326 S.E.2d 715 (W.Va. 1984). In determining fair market value of a piece of land, the Assessor must seek out all information which would enable him to properly fulfill his legal obligation. Id.

In denying the Foster Foundation's challenge to the appraised value of Woodlands, the County Commission set the value of Woodlands at greater than its true and actual value in contravention of the provisions of West Virginia Code § 11-3-1, et. seq. and denied Foster Foundation due process in challenging the excessive valuation. Due Process requires that the process by which the Foster Foundation was required to contest the assessed value of Woodlands be free from any conflict of interest. The statutory requirement that Foster Foundation contest its ad valorem tax assessment before the County Commission, which is vested with both decision-making authority and a direct financial interest in the outcome of the proceeding is an inherent conflict and prevents the Commission from being an impartial decision making tribunal as required by due process.

Additionally, the denial of due process is evidenced by the fact that the Assessor is not required to provide methodological or empirical support for its assessment while a high standard of proof (clear and convincing evidence) is imposed on the Foster Foundation to rebut the Assessor's initial valuation. In this matter the Foster Foundation presented detailed evidence through a licensed, certified appraiser while the Assessor was not required to present support for the valuation made by its employee, who is not a licensed appraiser. The Assessor was not required to, and in this case did not, provide any written evidence as to what information it had obtained and considered in reaching its valuation or the methodology used, or to otherwise show

how the Assessor had complied with its obligation to seek out all information which would enable him to properly fulfill his legal obligation to appraise the property at its fair market value.

Furthermore, on appeal before the Circuit Court, the County Commission was not required to, and in this case did not, provide any evidence as to what information it had obtained and considered in reaching its valuation and the methodology used, or to otherwise show how they determined the fair market value of the property.

- A. The County Commission has an impermissible conflict of interest in serving as both a decision maker on the Foster Foundation's appeal of an excessive tax assessment and a beneficiary of an increased tax revenue resulting from a higher assessed value of Woodlands.

The County Commission is responsible for the budgetary and financial affairs of the county. By statute, county commissions have the duty "to supervise the general management of the fiscal affairs and business of each county". See W. Va. Code § 7-1-5. Financial affairs of the County present an inherent and unavoidable conflict of interest for each and every county commissioner because the County Commission has an obvious interest in maximizing revenue while taxpayers are entitled to an unbiased tribunal in a valuation hearing. The County Commission's interest in maximizing revenue is at odds with granting reductions in the assessment values of real property (regardless of validity of claims) because it would directly result in a reduction of the tax base.

For example, the Foster Foundation believes its assessment was excessive by approximately \$14,859,000. Had the Foster Foundation been successful before the County Commission, the County's tax base would have been reduced by approximately \$200,000 annually. In every contested valuation there is an inherent conflict between the County Commission's inconsistent roles as the overseer of the county finances and as the tribunal for

hearing individual tax appeals. This conflict is magnified as the amount in controversy increases.

The County Commission's dual role as both a decision maker on the validity of taxpayer appeals and beneficiary of increased tax revenue resulting from higher tax assessments impermissibly results in a conflict of interest and denial of due process. The County Commission is simply ill-equipped to properly consider individual taxpayer appeals involving tax assessments because "the county commission lacks expertise in property evaluation but is extraordinarily knowledgeable about the government's need for money, an ingrained bias that is particularly harmful to non-voting entities". Rawl Sales & Processing Co. v. County Com'n of Mingo County, 191 W. Va. 127 at 133, 443 S.E. 2d 595 at 601 (1994), Neely, Justice, dissenting. The resulting conflict of interest would not be tolerated in other civil or criminal matters.

- B. *The imposition of a clear and convincing standard of proof on taxpayers who contest an ad valorem tax assessment before a County Commission constitutes a denial of due process.*

The West Virginia Supreme Court on several different occasions has stated that the law presumes the Assessor's valuations to be correct and places the burden of proving an incorrect assessment on the taxpayer. As discussed in In Re: Tax Assessment Against American Bituminous Power Partners, LP., 539 S.E.2d 757 (W. Va. 2000), the burden is upon the Foster Foundation to demonstrate error with respect to the Assessor's valuation is to produce clear and convincing evidence.

The imposition of a clear and convincing standard of proof upon the taxpayer coupled with the lack of imposition of any standards regarding the information to be presented by the Assessor or the basis of review by the County Commission results in a denial to the taxpayer of due process of law. The Assessor has an obligation to seek out all information which would

enable him to properly fulfill his legal obligation to determine the fair market value of the property in question. See Kline v. McCloud, 326 S.E.2d 715 (W.Va. 1984). In this case, the taxpayer has presented evidence from a licensed, certified appraiser that the Assessor's valuation is excessive. The Assessor has presented no written evidence that it has sought out or considered any of the information readily available to and used by Mr. Withers, the taxpayer's appraiser, and has presented no written evidence as to the underlying data and methodology used by the Assessor or his non-licensed employee in arriving at the Assessor's valuation.

In the instant case, the Assessor did not present any written evidence at the February 9, 2007 hearing before the County Commission to contradict Foster Foundation's evidence. Foster Foundation's primary evidence was the report of a highly qualified, licensed, appraiser as required by the regulations. Even after Foster Foundation presented evidence that the Assessor's valuation was excessive, the Assessor was not required to, and did not, present any additional written evidence in support of its valuation or to contradict Foster Foundation's assertions. Furthermore, on appeal, the County Commission did not present any evidence to the Court as to support its valuation or to contradict Foster Foundation's value assertions. The high standard of proof placed on Foster Foundation, lack of minimum requirements with respect to information presented by the Assessor and lack of standards for review by the County Commission, coupled with the County Commission's lack of specialized expertise and inherent conflict of interest results in a system that placed an inequitable, nearly insurmountable burden on Foster Foundation.

An additional factor giving rise to the denial of due process in this case stems from the specialized nature of the taxpayer and its use of its property. The County Commission lacks expertise in the field of property valuation. This is especially true for Woodlands. As described

in detail in section II below, Woodlands is a not for profit home for the aged. Appraising the value of such unusual property requires specialized knowledge and expertise possessed by an experienced real estate appraiser. Although the Assessor is required to seek out all information needed to determine the fair market value of properties there is no requirement that the Assessor or County Commission obtain the opinion of a licensed appraiser or otherwise demonstrate that the Assessor or the County Commission has taken steps to acquire the information, knowledge or expertise to properly evaluate such specialized property. It is the taxpayer who bears the expense of making accredited experts available to the County Commission while the law dictates that the Assessor's appraisal must be presumed to be correct even if, as here, the Assessor's employee who appraised Woodlands lacked similar professional credentials as the Foster Foundation's appraiser.¹

II. THE COUNTY COMMISSION AND THE CIRCUIT COURT FAILED TO CONSIDER THE UNIQUE STATUS OF THE WOODLANDS AS A NOT FOR PROFIT HOME FOR THE AGED.

The imposition of ad valorem real property taxes on 501(c)(3) nonprofit retirement communities is new to West Virginia law. In fact, neither the Woodlands nor Foster Foundation's other retirement home had been subject to such taxation until December, 2005. As previously discussed, the Foster Foundation was incorporated in 1920 as a not-for-profit corporation and remains such today. Since 1923, Foster Foundation has been granted and has maintained tax exempt status under the Internal Revenue Code. In fact, donors to the Foster Foundation receive charitable contribution deductions for income tax purposes. Furthermore, the

¹ The inherent problems of this high standard of proof are further evidenced by the disparity in qualifications of appraisers based solely on whom the appraisal is being provided for (Assessor's office versus taxpayer in the appeal process). Pursuant to West Virginia law and the dictates of the County Commission, the Foster Foundation retained the services of licensed real estate appraiser Robert K. Withers who has obtained West Virginia's highest accreditation as a State Certified General Real Estate Appraiser which, pursuant to West Virginia Code Section 30-38-4(d), authorizes him to conduct appraisals of all types of real estate.

Woodlands agrees to maintain its residents for life, even if they subsequently become unable to pay monthly service charges. The Foster Foundation in its 80 + years of existence has never required any resident to move or vacate its premises due to lack of financial resources.²

Like virtually all real property in West Virginia, the appraised value of Woodlands for ad valorem tax purposes is to be the fair market value based upon a willing buyer/seller in the marketplace. At the February 9, 2007 hearing before the County Commission, Mr. Daniels (Cabell County employee who appraised the Woodlands) testified as follows:

- Q. (By counsel for the Foster Foundation) When you look at the approach, do you look at willing buyer, willing seller?
- A. (By Mr. Daniels) Absolutely. That's the definition of market value.

See Transcript of February 9, 2007 County Commission hearing at page 28, lines 17-21.³

However, the value placed upon the Woodlands by the Assessor was primarily based on the application of construction costs. The subsequent value placed upon Woodlands by the County Commission in its February 22, 2007 Order approximates the amount of fire insurance which Foster Foundation testified that it maintained (presumably a measure of replacement cost). Although the amount of insurance/replacement value is one of many factors to be considered in determining the fair market value of property, it should not and cannot be the sole determining factor, especially in the case of a nonprofit owner that has numerous additional fiduciary responsibilities. In determining fair market value of a piece of land, the Assessor must seek out all information which would enable him to properly fulfill his legal obligation. See Kline v.

² This arrangement undoubtedly benefits all residents of West Virginia and lessens the burden of government.

³ Mr. Daniels did not consider as part of his appraisal that a willing buyer would take into consideration the liabilities of having to care for the Woodlands' residents for life regardless of their ability to pay.

McCloud, 326 S.E.2d 715 (1984). Mechanical application of construction cost or replacement value is particularly inappropriate for specialized use property and in the nonprofit setting.

To determine fair market value of property in the nonprofit setting one must, as Mr. Withers did and the Assessor and County Commission did not, consider the obligations and limitations attendant to the property in question and its operation. Mr. Withers considered these factors and looked to comparable property values as well. There is nothing in the record to indicate that the Assessor fulfilled its obligation in this regard. A charitable entity such as the Foster Foundation is not guided by a profit motive and may construct improvements for the benefit of the community it serves at a cost or replacement value greater than that for which it could expect to be able to resell the property in the open market. A charitable entity may impose, or have imposed upon it, limitations on the use and operation of its property that impact market value or marketability, such as Foster Foundation's policy of continuing to provide care to its residents regardless of ability to pay.

Moreover, West Virginia law requires that an appraiser be tested and licensed before giving opinions on property values. This reflects the need for a considered opinion based on a number of property specific and market related factors rather than the rote application of a single factor such as construction cost or replacement value. In the instant case, Mr. Withers, the only licensed appraiser to review this matter stated that a willing purchaser would not pay the equivalent of construction cost or "replacement value" for the structure. Construction cost and replacement value in no way reflects the necessary discount for the incumbent cost of caring for approximately 300 current residents for the remainder of their lives.⁴ Using only construction or replacement cost as determinative of value necessarily includes several "for profit" based

⁴ Another factor relevant to a potential purchaser would be that the net operating income of the Woodlands has seen a steady decline over the past six years, dropping by more than two-thirds over that time period.

assumptions that cannot be applied to the Woodlands. Indeed, Woodlands was constructed based on the assumption that no ad valorem taxes would be due.

Accordingly, in appraising the value of the Woodlands, the County Commission failed to consider several factors that substantially affect the fair market value of the Woodlands and arbitrarily imposed a valuation that was apparently based on the amount of insurance coverage. The resulting appraisal of Woodlands is approximately \$14,859,000 above its true and actual value as set forth in West Virginia Code § 11-3-1, *et. seq.*

PRAYER FOR RELIEF

WHEREFORE, the Foster Foundation respectfully requests that this Court REVERSE the Circuit Court of Cabell County and ORDER that Court to reduce the assessed value of Woodlands to its fair market value of \$14,900,000 for tax year 2007, provide such guidance as this Court deems necessary to prevent future violations of Appellant's (and others similarly situated) due process rights along with such other relief that this Court may deem just and proper.

FOSTER FOUNDATION

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CIVIL ACTION NO. 07-C-214
Judge John L. Cummings

CERTIFICATE OF SERVICE

The undersigned attorney does hereby certify that on the 14th day of April, 2008, a true copy of the foregoing "*Brief of Appellant*" was served upon the following counsel by depositing the same, postage prepaid, in the United States Mail:

William T. Watson, Esquire
Post Office Box 1371
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By: 

Of Counsel